IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1948.

No. 350

LA SALLE-MADISON HOTEL COMPANY,
Petitioner,

vs.

WILLIAM DUNSTERVILLE DENHAM,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner respectfully prays that a Writ of Certiorari may issue from this Court to the United States Circuit Court of Appeals for the Seventh Circuit, to review the record in the above cause.

Opinions Below.

The decision of the District Court (R. 48) is not reported, but appears at page 48 of the Record. The Opinion of the Circuit Court of Appeals is reported in 169 Fed. (2nd) 576. The Order denying the Petition for Rehearing appears at Page 109 of the Record.

Jurisdiction.

The Judgment of the Circuit Court of Appeals was entered on June 7, 1948.[1] Petition for Rehearing duly filed by Petitioner was denied on July 26, 1948.[2] The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, and under Rule 38 of the rules of this Court, upon the following specified grounds:

Reasons Relied on for Allowance of Writ.

I. The decision of the United States Circuit Court of Appeals for the Seventh Circuit in this cause has decided an important question of local law in a way in conflict with and contrary to an applicable decision of the Supreme Court of Illinois;[3] and

II. The decision of the United States Circuit Court of Appeals for the Seventh Circuit in this cause is also in conflict with and contrary to a decision of this Court.[4] The decision of this Court, handed down prior to *Erie R. R.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, is in accord with the applicable decision of the Supreme Court of Illinois.[3] [4]

The decision of the Circuit Court of Appeals is therefore contrary to that of the Supreme Court of the State of Illinois, and to an opinion of this Court corroboratory thereof, on a question of local law.

The importance of the decision lies in the fact that it will govern the interpretation of the extent of coverage,

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[1] R. 66.

[2] R. 109.

[3] Mammina v. Homeland Insurance Co., 371 Ill. 555.

[4] Howard Fire Insurance Co. v. Norwich & N. Y. Trans. Co., 79 U. S. 194.

and the obligation of Insurers to defend an Insured, under public liability insurance contracts insuring against losses occurring from fire and from theft, where the fire and the thefts either coincide or follow one another, but are otherwise unconnected. The decision of the Court of Appeals holds in effect that fire is *ipso facto* and as a matter of law the cause of all thefts from the premises which are discovered within a period of seventeen hours to several days after the start of a fire. It is therefore of extreme importance to the insuring public generally and to insurance underwriters who contract to assume such liability to have finally determined the rule of construction to be applied in such cases. If the decision of the Circuit Court of Appeals is to stand, the cost to the insuring public of liability policies of the kind here involved must necessarily be astronomical. It is regarded as a decision of first impression, because no prior decision interpreting similar provisions has been found. The Circuit Court of Appeals so observed.[1]

Summary Statement of the Matter Involved.

William Dunsterville Denham, the Respondent here, brought this representative action on behalf of himself and a specified group of underwriters at Lloyd's, London, for a Declaratory Judgment to determine the extent of coverage afforded by an Innkeeper's Liability Policy made by them with the Petitioner LaSalle-Madison Hotel Company, an Illinois corporation. By this contract, the Underwriters agreed to assume the liability of the Petitioner for loss of or damage to property of any guest or invitee from any cause whatsoever, with a limit of $10,000.00 for all losses from any one occurrence or catastrophe; but with a further proviso that the policy limit

[1] R. 71.

was "immediately reinstated" with respect to any "subsequent loss". A fire occurred in the Insured's hotel on the early morning of June 5, 1946, and when the guests were escorted back to their respective rooms, from seventeen hours to several days later, much of their property was found to be missing. The parties hereto and the Courts below have treated the loss of the missing property as thefts.[1] The losses of property of guests by fire and from thefts are the subject of claims against the Hotel aggregating in excess of $100,000.00.[2] The losses by fire and by theft are separable and ascertainable, each claimant having separately stated the damage by fire and the loss by theft.[3]

It is the position of the Petitioner that all losses by fire were occasioned by one occurrence or catastrophe, and that the policy limit for all such losses is $10,000.00; but that each theft of each guest's property from their respective rooms is a "separate occurrence" and a "subsequent loss" for each of which there is a separate coverage of up to $10,000.00 under the terms of the policy.

It is the position of the Insurers that the fire was the proximate cause of each theft and that there is but $10,000 coverage for all claims arising either from the fire or from the separate thefts from the separate rooms of such guests. The thefts were discovered from 17 hours to several days later.

It is the contention of the Petitioner Hotel Company that each theft from each guest's room was proximately caused by the intervening, separate, independent act of a criminal, and that such act, and not the fire, was the proximate cause of each theft. That damage by fire was over when the fire was extinguished. That it took the separate,

[1] R. 66.
[2] R. 46.
[3] R. 10, 46.

independent criminal acts of third parties to effect each theft. That each theft was a separate occurrence, within the language of the policy, to which a separate limit of $10,000.00 applied in each instance. That while the fire may have provided an easier means of access for the criminals who committed the thefts, it was no more the proximate cause of each theft than if a guest had left his door or his window unlatched when leaving his room. And that the theft losses would not have occurred but for the separate intervening criminal acts which were in each instance the direct and proximate cause of the loss of the goods.

The following are the particular provisions of the policy involved:

> "Section 1.—Insuring Agreements.
>
> A. Loss Liability. To pay, subject to the limits expressed in Section III B. hereof, on behalf of the Assured all sums which the Assured shall become legally obligated to pay to any person or persons by reason of liability for damage to or loss of property of any guest or invitee while said property is in the custody or control of the Assured or on the premises of LaSalle Hotel, Chicago, Illinois * * *"[1]
>
> "Section III.—Conditions.
>
> B. Limits of Liability. The limit of Underwriters' liability for any one occurrence or catastrophe during the Policy period is $10,000. (Ten Thousand Dollars) for all loss of and damage to property of any claimant or claimants.
>
> Any payment made by Underwriters on account of such loss or damage shall reduce Underwriters' liability by the amount so paid except as provided by Condition H. hereof for reinstatement of Insurance for subsequent losses. * * *"[2]

[1] R. 37, 38.
[2] R. 39.

H. Reduction in Amount of Insurance and Reinstatement. Any payment made under this Policy shall reduce the aggregate amount of Insurance by the amount so paid, but in any such case, the amount of Insurance shall be immediately reinstated as respects any subsequent loss, to apply in accordance with the limits of liability as before any loss occurred."[1]

The other question involves the obligation of the Underwriters, under the terms of the policy, to defend the Insured against all claims for losses insured against. The Underwriters contracted to defend the Insured in any suit alleging such loss and seeking damages, "even if such suit is groundless, false or fraudulent". The language of the policy contract in this respect is as follows:

"B. Defense, Settlement, Supplementary Payments. It is further agreed that as respects Insurance afforded by this Policy, Underwriters shall—

1) Defend the Assured in his name and behalf any suit against the Assured alleging such loss and seeking damages on account thereof, even if such suit is groundless, false or fraudulent * * *."[2]

It is the contention of the Petitioner that this obligation is a separate undertaking to defend any suit involving any loss insured against, even though such suit be "groundless, false or fraudulent", and that the Insured is entitled to such defense in order to determine whether there is any liability of the Insured to be assumed by the Underwriters under their other undertaking in the Policy to pay such liability if established.

Petitioner contends that the payment of any liability of the Insured (if established in such action) is but one undertaking assumed by the Insurers. The defense of the

[1] R. 40.
[2] R. 38.

Insured against such liability is a second, and necessarily prior, undertaking of the Insurers. That unless and until liability of the Insured is determined, there is no obligation on the Insurers to discharge the liability, *i. e.*, there is nothing insured against but the defense of the action. That the defense of any such suit "even though groundless, false or fraudulent" is therefore the primary obligation of the Insurers, and that the payment of any liability, if thus established, is a second, and separate, obligation of the Insurers.

Petitioner's position was sustained by the District Court. A Declaratory Judgment was there entered in favor of the Petitioner, holding that the thefts were separate occurrences from the fire and from each other, to each of which the $10,000.00 limit of liability applied; and also holding that the Underwriters were obligated under the terms of the policy to defend the Insured in all actions involving claims for losses coming within the provisions of the policy.[1]

The Circuit Court of Appeals reversed the judgment of the District Court and held that the thefts were proximately caused by the fire and that the $10,000 limit of liability was therefore not reinstated as to each subsequent theft. The Circuit Court of Appeals also held that the Insurers were not bound to defend these claims once the single $10,000 limit of liability was exhausted, and that where a loss results from one occurrence, that under the language of Paragraph H of the policy, the Insured is without coverage with respect to any subsequent loss until the Insurers get around to paying the prior loss.[2] The effect of such holding is, of course, to place it within the power of the Insurers, by merely withholding payment of a prior loss or while awaiting the determination of the Insured's liability with respect thereto, to leave the Insured without the reinstated, multiple coverage extended to it by the policy.

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[1] R. 48-53.
[2] R. 79.

The Petitioner contends that such an interpretation is not only without merit upon its face, but defeats the entire purpose and intent of the parties in insuring against the liability of the Insured with respect to subsequent losses during the term of the policy.

The Circuit Court of Appeals based its judgment upon general language on the subject of proximate cause, unrelated to the facts in a line of cases, largely from other jurisdictions, insuring the personal property of the insured against loss by fire only. The policy in many of those cases specifically excluded coverage by theft and were intended to cover against only one occurrence— fire. There was no multiple coverage provided by any such policy. They generally contained a provision to the effect that the insured was obligated to protect his insured goods against further loss or damage from the single peril insured against—fire. The holdings in those cases, while concluding that fire was the "proximate cause" of the theft of the insured's goods, were merely using such designation to give expression to the equitable principle that where an insured, to comply with the terms of his policy, removes his goods, as he is required to do under the policy, to protect and preserve them from further loss or damage from the peril insured against (fire), the courts will not penalize him, and they therefore hold that where a loss occurs as a result of the performance of that duty by the insured the fire will be considered the "proximate cause" of the thefts. It is the contention of the Petitioner that such cases have no bearing upon the coverage extended by a public liability policy protecting the insured from liability to third parties on multiple losses occurring from any cause or causes whatsoever. The policy in the case at bar contemplates coverage against multiple claims for liability against loss of property from different causes, rather than protection of the Insured's own property against a specific risk insured against. Peti-

tioner contends that the rule of construction announced by the Illinois Supreme Court,[1] and by this Court,[2] should be applied in this case, because in this case, as in those cases, the damages from separate losses insured against are separable and ascertainable and are the direct result of separate and distinct causes.

Questions Presented.

I. (A) Does the rule of construction with respect to the coverage afforded by an Insurance policy, as announced by the Illinois Supreme Court[1], and by this Court,[2] govern the construction of the coverage afforded by an Innkeeper's Liability Policy issued in Illinois to an Illinois insured?

(B) Specifically, if an insurance policy limits the insurer's liability to $10,000.00 for any one occurrence, but provides for "immediate reinstatement" of such limit for any "subsequent loss" within the policy period, does the policy limit for losses to property of guests by fire also extend to losses of property of guests by thefts which occur prior to their return to their rooms from seventeen hours to several days later; or is each theft, brought about by the separate, intervening criminal act of a third person, a separate occurrence and a subsequent loss, each carrying a separate $10,000 limit of liability, under the terms of the policy?

(C) In effect, the broad question to be decided in this case, and the one which is of extreme importance to the insuring public, is whether fire is, of itself, *ipso facto*, to be held the direct and proximate cause of thefts from the premises prior to the return of the occupants thereto, simply because the fire provided an easier means of access by thieves; or is the separate, intervening criminal act of the thief the proximate cause of each theft?

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[1] Mammina v. Homeland Insurance Company, 371 Ill. 555 (599, 560).

[2] Howard Fire Insurance Co. v. Norwich & New York Transportation Co., 79 U. S. 194, 20 L. Ed. 378.

II. The second question involves the obligation assumed by the Insurers to "Defend the Assured in his name and behalf (in) any suit against the Assured alleging such loss and seeking damages on account thereof, even if such suit is groundless, false or fraudulent • • •" Is this a separate undertaking to defend any suit involving any loss insured against, in order to determine whether there is any liability of the Insured which the Underwriters then undertake to assume? Put another way, is payment of any liability of the Insured (if it is established in such action) one undertaking assumed by the Insurers, and the defense of the Insured on the question of such liability a second, and prior, undertaking of the Insurers, under the policy?

III. Based upon the answers to the foregoing, should the judgment of the Circuit Court of Appeals for the Seventh Circuit be reversed, and the judgment of the District Court affirmed?

Specification of Errors to Be Urged.

The Circuit Court of Appeals erred:

1. In reversing the judgment of the District Court; and

2. In holding that fire is *ipso facto* as a matter of law the proximate cause of thefts occurring before guests return to their rooms in the building in which the fire occurs;

3. In failing to hold that each theft from each room of guests, discovered from seventeen hours to several days after a fire occurs, are proximately caused by the separate, independent, intervening act of a third party intent upon committing a crime, and not by the fire, the damage from which ceased when it was extinguished;

4. In holding that a policy covering both fire and theft, and carrying a $10,000.00 limit of insurers' liability for any one occurrence, but providing for immediate and successive reinstatement of such limit with respect to any subsequent loss, limits the amount of insurance to a single limit of $10,000.00 for losses by fire and for losses by theft, even though the losses by fire and by each theft are separable and ascertainable, and even though the thefts would not have occurred but for the separate, intervening, criminal acts which produced each theft;

5. In holding that a remote cause (fire), or the *"causa causans"*, was the proximate cause of the thefts, where a separate and independent criminal act intervenes to directly cause each theft;

6. In holding that fire, and thefts which are discovered from seventeen hours to several days after the start of a fire, are all "one occurrence";

7. In holding that such thefts are not separate occurrences and subsequent losses to each of which the $10,000.00 limit of the policy for any one occurrence applies, within the terms of the policy in question;

8. In holding that when a loss occurs the Insured is without further coverage under the policy until such time as the Insurers determine the liability and pay the loss.

9. In holding that the obligation to defend the Insured against claims for losses insured against, "even if such suit is groundless, false or fraudulent",[1] is not a separate obligation assumed by the Insurers, in addition to the obligation to pay any liability of the Insured if same is thus established;

9. And in failing to hold that the obligation assumed by the Insurers to defend the Insured in suits alleging

[1] R. 38.

losses covered by the policy is a separate, and prior, undertaking of the Insurers, necessarily undertaken to determine whether there is any liability on the part of the Assured, which is the second undertaking, assumed only if such liability is established after defense is interposed upon behalf of the Insured in such suits.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

Opinions below are cited in the petition (p. 1).

Jurisdiction.

Grounds of jurisdiction are set forth in the petition (p. 2).

Statement of Case.

A summary of the case has been made in the petition (pp. 3-9).

Specification of Errors.

A specification of the errors which are intended to be urged is made in the petition (pp. 10-12).

SUMMARY OF ARGUMENT.

I.

Where one of several successive causes is sufficient to produce a loss, the law will not regard an antecedent cause as the proximate cause of the loss, when the loss or damage from each cause can be separated from the loss or damage from each of the other causes. A remote cause (fire), or the "causa causans", is not the proximate cause of thefts where separate and independent criminal acts intervene to directly cause each such theft.

II.

The error in the opinion of the Circuit Court of Appeals is further illustrated by the observation, in its opinion, that under the terms of this policy the insured is without further coverage under the reinstatement clause from the time one loss occurs, until the insurer pays or secures a determination of the non-liability of the insured with respect to that loss.

III.

The obligation assumed by the insurers under the policy to defend any suit alleging any loss insured against "even though such suit be groundless, false or fraudulent" is a separate, and prior, undertaking of the insurers to the other obligation assumed to pay any such liability in the event that same is established after their defense of such action.

ARGUMENT.

I.

Where one of several successive causes is sufficient to produce a loss, the law will not regard an antecedent cause as the proximate cause of the loss, when the loss or damage from each cause can be separated from the loss or damage from each of the other causes. A remote cause (fire), or the "causa causans", is not the proximate cause of thefts where separate and independent criminal acts intervene to directly cause each such theft.

We cannot emphasize too strongly the importance of this decision as determinative of the rule of construction to be applied to insurance contracts of the type here involved. No case has yet been decided in which the specific question has been raised, and the effect of the decision of the Circuit Court of Appeals, if allowed to stand, will be to make theft coverage under the circumstances here involved so prohibitive as to be impossible to obtain.

Even the Underwriters, represented by the Respondent in the case at bar, will not deny that this policy was intended to defend and protect the Insured against liability for multiple and successive losses of the property of guests from any causes whatsoever while on the premises of the Hotel during the period of the policy.[1] Under such coverage, if a theft occurs in my room today, and a fire in your room tomorrow, these are each losses covered under the policy and the "subsequent loss" carries an automatically reinstated policy limit.

[1] R. 37, 38.

The policy provides that the limit of Underwriters' liability for any one occurrence or catastrophe during the policy period is $10,000.00 for all loss of or damage to property of any claimant or claimants.[1] This provision would limit the liability for the theft loss from my room today to $10,000.00, but the reinstatement provision would reinstate that limit with respect to the fire in your room tomorrow (it being a separate occurrence and a subsequent loss) so that the Assured would also have a $10,000.00 limit of coverage applying to the loss of property from your room the day after the theft from my room. This is provided for by the provision in the policy that any payment made by Underwriters on account of "such loss or damage" (*i. e.*, from any one occurrence) shall reduce Underwriters' liability by the amount so paid, except as provided in Condition H thereof for reinstatement of insurance for subsequent losses.[2] Condition H provides that any payment made under the policy shall reduce the aggregate amount of insurance by the amount so paid, but in any such case the amount of insurance shall be immediately reinstated as respects any subsequent loss to apply in accordance with the limits of liability as before any loss occurred.[3]

There can, therefore, be no question but what, under the plain intendment of these provisions, a theft from my room today carries a $10,000.00 limit of liability, and a fire in your room tomorrow, being a separate occurrence and a subsequent loss, carries a separate, reinstated $10,000.00 limit of liability.

Now, supposing we reverse the above illustration and assume a fire in your room today and a theft in my room tomorrow. These are obviously separate occurrences, to each of which a $10,000.00 limit of liability applies. The

[1] R. 39.
[2] R. 39.
[3] R. 40.

$10,000.00 limit of liability applies to the fire in my room today, and that limit is immediately reinstated with respect to the "subsequent loss" by theft in your room tomorrow. If that were not the case, then effect could not be given to the policy provision for immediate reinstatement of the policy limit with respect to a "subsequent loss".

Wherein lies the difference, then, between that situation and the loss of property of guests by fire (one occurrence, to which the $10,000.00 limit of liability applies) and losses of property of guests by theft prior to their return to their rooms from seventeen hours to several days after the fire occurs? The damage by fire is obviously one occurrence. The loss by each theft is obviously a separate occurrence both from the fire and from the other thefts. The fire did not proximately cause the thefts. The damage by fire ceased when the fire was extinguished. No theft would have occurred as the result of the fire. It took the separate, independent, intervening act of a criminal to cause each theft. That intervening criminal act was the proximate cause of the theft. The fire may have provided an easier means of access to the thief, but the theft still would not have occurred except for the separate, intervening, independent, criminal act of the thief. Such was the proximate cause of each theft.

That there is no direct causal connection between the fire and the thefts, and that each theft is a separate occurrence from the fire, is made abundantly clear when it is stated that if the insurers are able to establish, in their defense of the insured against claims for loss of property of guests by theft, that the fire was started by one or more of the thieves for the purpose of providing an easier means of access to the property which they sought to

steal, then, and only then, could it be said that the fire and the thefts were one occurrence. Or, if the insurers could thus show that the thieves, in order to hide their depredations, started the fire, then certainly the thefts and the fire could be said to be one occurrence. In the absence of such proof, however, it is perfectly apparent that the damage by fire ceased with the extinguishment of the fire. The thefts could only occur as a result of the direct intervening criminal act of the thief, or thieves, in entering the room of each guest and stealing his property. Such acts, and not the fire, are, under any test that may be applied, the direct and proximate cause of each theft.

Likewise, each theft was a separate criminal act and a separate occurrence from each other theft, unless, again, the insurers can show that all of the thefts were occasioned by a gang of thieves acting in concert.

In *Mammina* v. *Homeland Insurance Co.*, 371 Ill. 555, a truck, insured against fire only, collided with a train and then caught fire. The insurer there claimed that the collision was the proximate cause of the fire and denied liability on the ground that there was no insurance against collision, and since collision was the proximate cause of the fire there was no liability under the policy. The Illinois Supreme Court quoted and followed the same rule of construction which had previously been invoked by the United States Supreme Court[1] governing the construction of the coverage afforded by insurance policies, and held as follows:

> Where damages caused by collision and damages caused by fire are separable and ascertainable, the insurer is liable under its policy for the loss insured

[1] Howard Fire Insurance Co. v. Norwich & N. Y. Trans. Co., 79 U. S. 194, 20 L. Ed. 378.

> against, i. e., fire, even though the fire directly results from a loss not insured against, i. e., collision.

This rule is based upon the premise that an insurer will not be permitted to avoid coverage extended by it under a policy contract where the damage resulting from the peril insured against is separate and ascertainable from the damage resulting from an antecedent, nearly concurrent, cause not insured against. The Illinois Supreme Court in so holding adopted the rule of construction that:

> Where one of several successive causes is sufficient to produce a loss, the law will not regard an antecedent cause as the proximate cause of the loss when the loss or damage from each cause can be separated from loss or damage from each of the other causes.

The liability under an insurance contract for each such loss is separate, and under the policy insuring against multiple losses with reinstated limits of liability for separate occurrences and subsequent losses, each loss carries a reinstated policy limit.

This is the effect of the decision of the Illinois Supreme Court when applied to the case at bar. The same rule of construction was adopted by this Court in *Howard Fire Insurance Co.* v. *Norwich & N. Y. Transportation Co.*, 79 U. S. 194, 20 L. Ed. 378. In that case, as in the *Mammina* case, two causes of loss concurred, or followed one another in quick succession. The trial court had made a finding of fact that the damages resulting from each cause "can be discriminated". The vessel there was insured against loss by fire, but not against loss resulting from collision. One of the causes of loss was water which entered as a result of a collision and damaged the vessel and her cargo. The other cause of loss

was fire which ensued when the water reached the boilers and spread their fire to the wooden portions of the vessel. It was found as a fact that the water damage ensuing from the collision totaled $15,000.00, and that the balance of the damage (amounting to $73,000.00) "was the natural and necessary result of the fire and of the fire only".[1] It was argued there, as it was argued in the *Mammina* case, and as the Respondent argues here, that, as the influx of the water was the direct and necessary consequence of the collision, the collision was the proximate cause of the loss by fire. This court observed that such argument overlooks the fact distinctly found that the vessel would not have sunk and the damage from the collision would have been limited to $15,000.00 had it not been for the ensuing fire, and that the additional and separately ascertainable damage caused by the sinking was "the natural and necessary result of the fire only".[2]

That observation can also be applied to the situation in the case at bar. In that case, this Court said:

> "It is found that the water would not have caused the vessel to sink below her promenade deck, had not some other cause of sinking supervened. It would have expended its force at that point."[3]

We can paraphrase that language by this Court and apply it to the facts in the case at bar thus:

> "It is found that the fire would not have caused the thefts from the individual rooms of each guest, had not some other cause of the thefts supervened. It would have expended its force at that point."

This Court went on to say:

> "The fire was therefore the efficient predominating cause, as well as nearest in time to the catastrophe, which * * * enlarged the destructive power of the water."[3]

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[1] 79 U. S. 194 at p. 197; 20 L. Ed. 378 at p. 378, 379.
[2] 79 U. S. 194 at p. 198, 20 L. Ed. 378, at p. 379.
[3] 79 U. S. 194 at p. 198, 20 L. Ed. 378, at p. 379.

Again paraphrasing that language of this Court and applying it to the case at bar:

> "The separate acts of the thieves were, therefore, the efficient predominating cause, as well as nearest in time, to each theft."

It is even more clear, in the case at bar, that fire in the Hotel would not have caused the theft of property of guests from their separate rooms "had not some other cause (theft) intervened". In both the *Mammina* and the *Howard* cases, the collision which preceded the fire was undoubtedly the proximate cause of the fire, yet this Court and the Illinois Supreme Court both held that an insurer was bound to honor the coverage afforded by its policy where the damage from the loss insured against was separable and ascertainable from the loss not insured against. In the case at bar, the application of that rule to compel the Insurer to honor the multiple coverage extended by its policy is even more logical, for in the case at bar *there is no direct causal connection whatsoever* between the fire and the loss of property of guests by theft. The damage by fire ceased with its extinguishment. The fire could not cause loss of property of guests by theft. It took the separate, intervening, criminal act of a third party. Each theft was therefore a separate occurrence from the fire as well as from each other, and each therefore carried a reinstated policy limit.

No one would say for a minute that a guest's leaving a window unlocked when he leaves his hotel room would be the proximate cause of a theft of his property from that room. For the same reason, fire is certainly not the proximate cause of any such theft. Leaving the window unlocked didn't cause the theft any more than the fire did. The fire, like leaving the window unlocked, did

nothing more than provide an easier means of access to a thief.

If any further illustration should be necessary to demonstrate that the fire and each theft from each guest's room are separate occurrences, then we would like to relate another instance, used by this Court in the *Howard* case, to the supposition earlier presented in this Brief of a fire in my room today and a theft from your room tomorrow. In illustrating the point of the separability of the two causes, this Court said:

> "This plainly appears, if we suppose that the fire had occurred on the day after the collision, and had originated from some other cause than the collision itself. The effects of the prior disaster (the collision) would then have been complete. The steamer * * * would have been towed to a place of safety and saved, in that condition, to her owner * * * But the fire occurring on the next day * * * would have caused her to sink to the bottom as she did * * * Wherein does the case supposed differ in principle from the present when the facts found are considered?"[1]

Indeed, wherein does the case supposed differ in principle from the present? If the separate thefts of the property of guests had occurred the day before, or the day after, the fire, the effect of each theft would have been separate and complete. There could be no doubt that had a theft occurred the day before the fire, the damages resulting a day later to the property of guests by fire would have been a "separate occurrence" and a "subsequent loss" as such language was employed by the Underwriters in drafting this contract of insurance. Similarly, if a theft of the property of a guest had occurred several days after the fire, there could be no question but what the separate, independent, criminal act of third persons would be the immediate, proximate cause

[1] 79 U. S. 194 at p. 198, 20 L. Ed. 378 at p. 379.

of the theft. In what way do either of the cases supposed differ in principle from the present? It was not the fire, it was the independent, separate, criminal act of a third person which caused each theft. They were separate occurrences. Each, therefore, carried a separate reinstated policy limit of $10,000.

This is not a case where the losses to property of guests by fire cannot be distinguished from their losses by theft. The Respondent has stipulated here, and the facts are therefore undisputed, that the damages claimed by each guest for loss by fire are separable from the damages by theft. The dollar amounts of the claims for each cause of loss are separately stated in the record.[1]

While the facts involved here are few, and undisputed, the question of law involved is of extreme importance. The decision of the Circuit Court of Appeals, if permitted to stand, will deprive the insuring public of coverage to which they are not only plainly entitled, but will make the cost of securing additional theft coverage, under such circumstances, absolutely prohibitive.

We respectfully urge that the judgment of the Circuit Court of Appeals be reversed and that of the District Court be affirmed.

II.

The error in the opinion of the Circuit Court of Appeals is further illustrated by the observation, in its opinion, that under the terms of this policy the insured is without further coverage under the reinstatement clause from the time one loss occurs, until the insurer pays or secures a determination of the non-liability of the insured with respect to that loss.[2]

The plain intendment of the provisions of this policy is that the policy shall protect the Insured from liability

[1] R. 10-17.
[2] R. 78, 79.

for multiple and successive losses occurring during the policy period. The policy specifically provides for reinstated policy limits with respect to each separate occurrence and subsequent loss. The entire purpose and intention of purchasing insurance of this character would be defeated if an insurer could, by postponing the payment of a prior loss, postpone the effective reinstatement of the policy limits with respect to any subsequent loss, under a policy providing multiple coverage for such losses.

III.

The obligation assumed by the insurers under the policy to defend any suit alleging any loss insured against "even though such suit be groundless, false or fraudulent" is a separate, and prior, undertaking of the insurers to the other obligation assumed to pay any such liability in the event that same is established after their defense of such action.

The obligation to defend such suits, specifically assumed by the Insurers under this policy,[1] is a separate, and precedent, undertaking to bear the expense of the determination of the liability of the Insured with respect to each such loss insured against. Only in the event that the liability of the Insured is thus established, is there any obligation upon the Insurer to discharge that liability.

This question will not, of course, arise in the event that this Court, as we believe it must, reverses the judgment of the Circuit Court of Appeals and affirms the judgment of the District Court. The Insurers admit their obligation to defend these claims in such event, even though it is conceded by all that the claims arising from dam-

[1] R. 38.

age to the property of guests by fire (one occurrence) will exceed the $10,000.00 limit. They concede that if this Court holds that the losses of property of guests by theft were occurrences separate from the fire and from each other, that they must defend these claims under the terms of the policy. If they were to be consistent, they should take the position that, in such event, they do not have to defend the balance of the fire claims because the policy limit with respect to the fire claims (one occurrence) is exhausted upon the payment of the $10,000.00 limit of liability for claims arising from the fire. This would then create the same ridiculous result as that which now prevails under the decision of the Circuit Court of Appeals, which deprives the Insured of the right to the defense by the Insurers of the theft claims, even though such claims be "groundless, false, or fraudulent".

The obligation to defend the Insured against such claims is obviously a separate, and prior, obligation to the obligation which the Insurers have assumed to pay the liability of the Insured if thus established. This becomes apparent both from an examination of the language of the policy and from a practical consideration of the purpose for which such policy was purchased by the Insured. While the plain intendment of the provisions of the policy is for the defense of the Assured against "any suit" alleging a loss insured against, "even if such suit is groundless, false or fraudulent",[1] there are, unfortunately, but two decisions which directly interpret the meaning of such provisions. Those two cases, by the Supreme Court's of Michigan and New Hampshire, respectively, are in hopeless conflict.[2]

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[1] R. 38.

[2] City Poultry & Egg Co. v. Hawkeye Casualty Co., 297 Mich. 509, 298 N. W. 114; Lumbermens Mutual Casualty Co. v. McCarthy, et al., 8 Atl. 2nd 750 (N. H.).

In the case at bar, it is provided under the "Defense, Settlement, Supplementary Payments" provision of the policy that "Underwriters agree to pay the expenses incurred under Divisions (1) and (2) of this Section in addition to the applicable limit of liability of this policy."[1] Under Division (1) of that Section, the Insurers agree that,

> "as respects insurance afforded by this policy", they will "defend the Assured in his name and behalf in any suit against the Assured alleging such loss and seeking damages on account thereof *even if such suit is groundless, false or fraudulent,* but Underwriters shall have the right to make such investigation, negotiation and settlement of any claim or suit as may be deemed expedient by Underwriters."

In the Michigan case above cited[2] the provision of the policy for defense of claims coming within the terms of the policy are substantially identical, and read as follows:

> (A) Defense, Settlement, Supplementary Payments.
>
> "It is further agreed that *as respects insurance afforded by this policy* under Provisions 1, 2 and 3 of Section 1, the company shall:
>
> "defend in his name and behalf any suit against the Insured alleging such injury sustained on account thereof, *even if such suit be groundless, false or fraudulent;* but the company shall have the right to make such investigation, negotiation and settlement of any claim or suit as may be deemed expedient by the company, * * *."

There a dispute arose between the insurance company and the insured as to the obligation of the former to defend an action brought against the insured. The Supreme Court of Michigan held:

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[1] R. 38.

[2] City Poultry & Egg Co. v. Hawkeye Casualty Co., 297 Mich. 509, 298 N. W. 114.

"The answer to this question depends upon whether the undertaking to defend suits against the insured alleging personal injury is independent and severable from the obligation to pay a judgment.

"We are of the opinion that the undertaking to defend and the undertaking for payment of damages were severable and independent. The obligation to defend suits alleging injuries sustained by persons, caused by accident and arising out of the use of the automobile, is clear and unequivocal. The insurance company could have limited its obligation to the defense of suits, where on the facts, the insurance company was liable to the insured in case of judgment. That, however, is not this case. Here, the undertaking to defend is absolute."

The Supreme Court of Michigan in its opinion distinguished cases cited by the insurer where the injury did not arise out of the operation insured against.

It must be conceded by all concerned that, in the case at bar, each of the claims, whether from loss by fire or from loss by theft, arise out of the operation insured against. The policy insures against liability for damage to or loss of property of any guest or invitee while in the custody or control of the Assured or on the premises of the LaSalle Hotel, Chicago, Illinois.[1] Each of these claims standing alone plainly come within that coverage. As held in the Michigan case, the Insurers agree to, first, defend the Insured in all suits coming within such coverage, and, second, to pay any liability of the Insured which might be thus established. It was clearly contemplated, by the language employed, and as held by the Supreme Court of Michigan under a policy containing identical language, that the Insurer undertook to defend the Assured, and then, and separately,

[1] R. 38

to pay any liability which might thus be established against the Assured. This is especially true when it is noted that the Insurers agree to conduct such defense "even if such suit is groundless, false or fraudulent".[1]

In the New Hampshire case above cited[2] there was a similar Defense, Settlement and Supplementary Payment clause in a policy and the insurer defended two claims brought against an insured, one of which, when prosecuted to judgment, exhausted the limit of coverage of the policy. The insurer then refused to defend the second claim. The Supreme Court of New Hampshire upheld the insurer's position on the ground that the obligation to pay was the primary obligation, and the obligation to defend was merely incident thereto and would not stand alone after the obligation to pay was exhausted. There was a dissent in the New Hampshire case, however, and in addition the court ignored the language "even if such suit be groundless, false or fraudulent" in passing upon the question.

The New Hampshire court based its opinion upon the gratuitous observation that it would not be to the best interests of the insured to compel the insurer to continue the defense of the claim in which it no longer had any financial interest. That decision, resting on such ground, is of no force in the case at bar, however, because the policy in the case at bar, drafted by the Insurers, makes specific provision against such a situation arising. It provides that in any case where the amount claimed in any suit is in excess of the Underwriter's liability, then the Assured may, at its option, be represented in the defense of such suits by associate counsel of the Assured's own selection.[3]

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[1] R. 38

[2] Lumbermens Mutual Casualty Co. v. McCarthy et al., 8 Atl. 2nd 750.

[3] R. 40.

It is thus seen that the decision in the New Hampshire case is not controlling in the case at bar because (1) the opinion did not take into consideration the entire language of the defense clause of the policy, and (2) the principal ground upon which the opinion rests is specifically provided for in the case at bar by a clause which entitles the Assured to participate in any action in which the limit of the Insurer's liability may be exceeded. The interests of the Insured are thus fully protected. No reason appears why the decision in the Michigan case, that the obligation to defend is a separate, and prior, obligation from the obligation to pay any liability which may be thus established, should not be followed.

It is respectfully suggested that a casual reading of the opinion of the Circuit Court of Appeals in the case at bar will reveal that practically no consideration was given to this most important question. This is illustrated by the observation of the Circuit Court of Appeals that, once a single claim is presented under the policy, the coverage with respect to any additional claim is automatically suspended until such time as the Insurers pay or compromise any liability of the Assured under that initial claim. Such a holding is ridiculous upon its face. It is indicative of the imperative necessity for a review of the opinion by this Court on the two questions involved, one of which has never before been passed on in any reported decision[1], and the other of which has been directly passed upon in only two reported cases, both of which are in jurisdictions foreign to that of the case at bar, and are in direct and hopeless conflict with each other.

[1] R. 71.

We therefore again respectfully pray that the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit be granted to review its judgment overruling the judgment of the United States District Court for the Northern District of Illinois, Eastern Division. We again call the Court's attention to the fact that the opinion of the Circuit Court of Appeals, if permitted to stand, will be authority for the proposition that fire is *ipso facto*, as a matter of law, the proximate cause of all thefts which occur some time during a period of seventeen hours to several days after a fire. Such a holding is completely illogical and is bad law.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 350

LA SALLE-MADISON HOTEL COMPANY,
Petitioner,

vs.

WILLIAM DUNSTERVILLE DENHAM,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MAY IT PLEASE THE COURT:

The Respondent submits herewith his Brief in Opposition to the Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

The Opinion of the Circuit Court of Appeals fully reviews the authorities we have been able to find, applicable to the situation in the instant case, as well as the authorities cited by the Petitioner. We shall, therefore, not reiterate or repeat what is said in the Opinion of the Circuit Court of Appeals, as it speaks for itself, and this Brief is confined to matters which do not fully appear from said Opinion.

SUMMARY OF ARGUMENT.

I.

The Decision of the United States Circuit Court of Appeals in This Case Is Not in Conflict With an Applicable Decision of the Supreme Court of Illinois.

II.

The Decision of the United States Circuit Court of Appeals in This Case Is Not in Conflict With a Decision of This Court.

III.

The Reinstatement Clause in the Policy Did Not Operate to Reinstate the Insurance Until Payment Was Made Under the Policy, and Then Reinstated the Policy Only as to Subsequent Losses.

IV.

The Insurers' Agreement to Defend the Claim Respecting Insurance Afforded by the Policy Does Not Obligate the Insurers to Defend Against Any Claim or Suit After Their Liability for Losses Under the Policy Has Been Exhausted.

ARGUMENT.

On Page 1 of the Petition for Writ of Certiorari it is erroneously stated that the Opinion of the Circuit Court of Appeals is reported in 169 Fed. (2d) 576. The Opinion is reported in 168 Fed. (2d) 576. In the Opinion contained in the Record, on Page 72, the case of *Case* v. *Hartford Fire Insurance Co.* is erroneously stated to be reported at 113 Ill. 676, whereas it should be stated that it is reported at 13 Ill. 676.

I.

The Decision of the United States Circuit Court of Appeals in This Case Is Not in Conflict With an Applicable Decision of the Supreme Court of Illinois.

Petitioner, as its first reason for requesting a Writ of Certiorari, says that the decision of the United States Circuit Court of Appeals for the Seventh Circuit decided an important question of local law in a way in conflict with and contrary to an applicable decision of the Supreme Court of Illinois. Petitioner cites *Mammina* v. *Homeland Insurance Co.*, 371 Ill. 555. The decision of the Circuit Court of Appeals in this case is not in conflict with and contrary to the decision in the *Mammina* case. In the instant case the Circuit Court of Appeals held that on a factual basis the theft losses occurred during the seventeen-hour period following the time the fire began. The Court said (168 Fed. (2d) 576, at 579; Rec. 71):

> "Thus we think this case must be considered on the factual basis that the theft losses occurred during the seventeen-hour period, during which the property of the guests through no fault of the hotel remained unprotected, and that such losses occurred concurrently with those resulting from fire, smoke and water."

The Court held that all such losses, whether from theft, fire, smoke or water, resulted from "one occurrence or catastrophe".

In the *Mammina* case the insured's truck was involved in a collision and following the collision caught fire. The evidence adduced at the trial disclosed that the truck was worth $2,000 before the collision; it was worth $350.00 following the collision and before the fire; it was worth $100.00 after the fire. The Court held that the Assured could recover on the fire policy $250.00, representing the value of the truck after the collision, less its value after the fire,

representing the damage to the truck by the fire. We fail to see how there is any conflict between the decision of the Circuit Court of Appeals and the decision in the *Mammina* case, and Petitioner does not disclose wherein there is any such conflict.

Not only is the decision of the United States Circuit Court of Appeals not in conflict with an applicable decision of the Supreme Court of Illinois, but, on the contrary, is in accord with principles declared by the Supreme Court of Illinois almost 100 years ago. In June, 1852, the Supreme Court of Illinois decided *Case* v. *Hartford Fire Insurance Co.*, 13 Ill. 676, which held that goods stolen during the confusion incident to a fire may be recovered as fire losses. The fire, under such circumstances, is regarded as the proximate cause of any loss that is sustained. That principle was applied by the United States Circuit Court of Appeals in making its decision in this case. That case, together with other cases relied upon, are cited and commented upon at length by the United States Circuit Court of Appeals.

Petitioner further states that the importance of the decision lies in the fact that it will govern an interpretation of the extent of the coverage, and further say that if the decision is to stand, the cost to the insuring public must necessarily be astronomical. It is a matter of common knowledge that insurance against risks is undertaken for a premium, and that the premium is in direct proportion to the risk. The premium and the risk are matters of contract between the insured and the insurer. The interpretation placed upon the policy involved in this case could only affect current policies. It would have no effect on policies which have expired, and any policies issued in the future can be written in the light of this decision. The Petitioner's fear of astronomical costs would therefore appear to be unfounded. Moreover, during the period of nearly

100 years since the Illinois Supreme Court decided *Case* v. *Hartford Fire Insurance Co.*, 13 Ill. 676, there has been no case raising the point urged by Petitioner, and it is unlikely that there will be any case arising out of any policy currently in effect in which the decision makes any difference to the insuring public.

Petitioner says the decision of the Circuit Court of Appeals "holds in effect that fire is *ipso facto* and as matter of law the cause of all thefts from the premises which were discovered within a period of 17 hours to several days after the start of the fire." As we have above pointed out, the Circuit Court of Appeals decided that the case must be considered on the factual basis that the theft losses occurred during the seventeen-hour period during which the property of guests remained unprotected. The Court says the reasonable and inescapable inference is that the theft losses took place concurrently with the fire losses, and further says: "The stipulated facts support such an inference" (168 Fed. (2d) 578; Rec. 70). Respecting the fire, the Court said:

> "Here was a fire of catastrophic proportions in a large hotel, with its attending confusion and chaos, during which the management was deprived of the opportunity and perhaps relieved of the responsibility of exercising any care for the protection of its guests and their property. Thus a fertile field and an opportune occasion was furnished for the wholesale thievery disclosed by this record" (168 Fed. (2d) 579; also Rec. 70, 71).

Petitioner says the decision of the Circuit Court of Appeals is regarded as a decision of first impression, because no prior decision interpreting similar provisions has been found, and that the Circuit Court of Appeals so observed. What the Circuit Court of Appeals said was: "No case is cited which from a factual standpoint is analogous to that here presented." (168 Fed. (2d) 579; Rec. 71.)

II.

The Decision of the United States Circuit Court of Appeals in This Case Is Not in Conflict With a Decision of This Court.

As its second reason relied upon for allowance of Writ of Certiorari, Petitioner says the decision of the Circuit Court of Appeals is in conflict with and contrary to a decision of this Court, and cites *Howard Fire Insurance Co.* v. *Norwich & N. Y. Transportation Co.*, 79 U. S. 194. There is no conflict between the decision of the Circuit Court of Appeals and the *Howard Insurance Company* case. The Circuit Court of Appeals held in this case that losses by theft during the confusion incident to a fire may be recovered under a policy for fire insurance; in other words, the theft losses constituted fire losses. In the *Howard Insurance Company* case the Court held that in the absence of a provision expressly excepting loss by fire resulting from collision, a loss caused by fire which resulted from a collision was recoverable under the fire insurance policy, notwithstanding that the fire resulted from the collision. The Court said (79 U. S. 200):

> "In the case before us there is no exception of collisions, or fires caused by collisions. It must therefore be understood that the insurers took the risk of all fires not expressly excepted."

We find no conflict between those two decisions, and Petitioner has not pointed out wherein any such conflict lies.

III.

The Reinstatement Clause in the Policy Did Not Operate to Reinstate the Insurance Until Payment Was Made Under the Policy, and Then Reinstated the Policy Only as to Subsequent Losses.

Petitioner contends that by reason of the provisions of Sections III-B and III-H of the policy the insurance automatically renewed itself immediately upon the happening of any event out of which a claim might arise. Section III-B reads as follows:

> "B. Limits of Liability. The limit of Underwriters' liability for any one occurrence or catastrophe during the Policy period is $10,000 (Ten Thousand Dollars) for all loss of and damage to property of any claimant or claimants.
>
> "Any payment made by Underwriters on account of such loss or damage shall reduce Underwriters' liability by the amount so paid except as provided by Condition H. hereof for reinstatement of Insurance for subsequent losses. The inclusion herein of more than one Assured shall not operate to increase the limits of Underwriters' liability." (Rec. 39.)

Section III-H reads as follows:

> "H. Reduction in Amount of Insurance and Reinstatement. Any payment made under this Policy shall reduce the aggregate amount of Insurance by the amount so paid, but in any such case, the amount of Insurance shall be immediately reinstated as respects any subsequent loss, to apply in accordance with the limits of liability as before any loss occurred." (Rec. 40.)

The Circuit Court of Appeals considered those Sections to mean that the policy was renewed upon the payment of the loss, as respects a loss occurring subsequent to the time of payment. Petitioner does not contend that such

interpretation was contrary to any decision of the Supreme Court of Illinois or the United States.

Petitioner's insurance was insufficient and it attempts to have an interpretation placed upon those provisions of the policy that would make them operate to stretch the $10,000 limit of the insurers liability to a policy of unlimited liability.

IV.

The Insurers' Agreement to Defend the Claim Respecting Insurance Afforded by the Policy Does Not Obligate the Insurers to Defend Against Any Claim or Suit After Their Liability for Losses Under the Policy Has Been Exhausted.

$10,000.00, representing the amount the insurer contended was its full liability for loss, was tendered by the insurer to the Petitioner, and accepted by the Petitioner without prejudice to the rights of either of the parties (Rec. 50).

Petitioner contends that the agreement of the Respondent to defend claims was an undertaking independent of the agreement to pay, as provided by the policy.

The Circuit Court of Appeals held that the obligation to defend was ancillary to the main provision to pay losses. The insurers agreed to defend "as respects insurance afforded by this policy". The defense clause reads as follows:

> "B. Defense, Settlement, Supplementary Payments. It is further agreed that as respects Insurance afforded by this Policy, Underwriters shall—
>
> "1) Defend the Assured in his name and behalf any suit against the Assured alleging such loss and seeking damages on account thereof, even if such suit is groundless, false or fraudulent, but Underwriters shall have the right to make such investigation, nego-

tiations and settlement of any claim or suit as may be deemed expedient by Underwriters; * * *" (Rec. 52).

Petitioner does not contend that the interpretation of the Circuit Court of Appeals of the agreement to defend is contrary to an applicable decision of the Courts of Illinois. It could not so contend. The only Illinois case we have been able to find dealing with the subject is *Brodek* v. *Indemnity Insurance Co.*, 292 Ill. App. 363. In that case the Plaintiff contracted an occupational disease which was not covered by the Workmen's Compensation Act and brought suit against the employer. The Insurance Company had agreed to defend suits and pay claims which would come under the Workmen's Compensation Act. The question presented was whether the insurer was bound to defend the suit. By the terms of the policy the insurer agreed "to defend, in the name and on behalf of this Employer, any suits or other proceedings which may at any time be instituted against him on account of such injuries, including suits or other proceedings alleging such injuries and demanding damages or compensation therefor, although such suits, other proceedings, and allegations or demands are wholly groundless, false or fraudulent". The Court held that the insurer was not obligated to defend the suit for occupational disease, inasmuch as it was not covered by the policy.

Other cases to the same effect are:

Lumbermans Mutual Casualty Co. v. *McCarthy* (N. H.), 8 Atl. (2d) 750, at 751, 752;

Texas Indemnity Co. v. *McLelland* (Tex.), 80 S. W. (2d) 1101;

Pickens v. *Maryland Casualty Co.* (Nebr.), 2 N. W. (2d) 593, at 596;

American Fidelity Co. v. *Deerfield Valley Grain Co.* (Vt.), 43 Fed. Supp. 841, at 844;

Ocean Accident & Guarantee Corp. v. *Peoples Wet*

Wash Laundry Co. (N. H.), 28 Atl. (2d) 418, at 420.

When the insured paid $10,000 in discharge of its liability, it was no longer obligated to defend any claim or suit against the Petitioner.

Conclusion.

We respectfully submit that the decision of the Circuit Court of Appeals is not in conflict with any applicable decision of the Courts of Illinois or of this Court, and the Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit should be denied.

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